No. 43735-0

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RAYNA MATTSON, individually,

Appellant/Plaintiff,

v.

AMERICAN PETROLEUM ENVIRONMENTAL SERVICES INC., a Washington Corporation; and BERND STADTHERR, individually, and the marital community comprised thereof,

Respondents/Defendants.

APPEAL FROM PIERCE COUNTY SUPERIOR COURT
The Honorable Judge Garold E. Johnson

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Appellant's Opening Brief was extensive and has already addressed all of the arguments asserted in Respondent's brief. Therefore, in order to avoid duplication, Appellant only addresses limited issues and cases cited by Respondents herein in her Reply.

II. ARGUMENT

A. THE RESPONDENT IS ATTEMPTING TO ASSERT AN IMPROPER "REASONABLE DOUBT" STANDARD IN A NEGLIGENCE CASE.

The respondents' arguments in this case demonstrate exactly why the application of the Res Ipsa Loquitor doctrine is so important. In that regard, Respondent argues that the oil on the road, on which Rayna Mattson undisputedly drove and lost control of her vehicle just coincidentally (1) showed up immediately after Defendant Stadtherr drove by in the same lane (2) with a hose which undisputedly and admittedly had leaking residual used oil in it and had just ruptured. Respondent did not ignore any of APES' evidence in her opening brief; it is all set forth therein. It is just that all of the overwhelming evidence supports Plaintiff's case and is cited in such regard. If there were ever a Res Ipsa Loquitor case wherein the doctrine should be applied as a matter of law, it is this case. Moreover, the difference with this case post trial versus at the time of Appeal No. 1, is that the questions that the Court of Appeals raised about the potential issue that otherwise precluded summary judgment were answered at trial and there were no facts, or reasonable inferences

therefrom, to sustain a verdict for the defense.

In direct opposition to Respondent's argument cited at page 16, this case is not an incident where there was a "mere fact that injury occurred." Again, as noted above, Respondent need not re-address the same facts and arguments already addressed extensively in her opening brief including the lack of coincidence in the sequence of events that gave rise to Rayna's collision.

Respondent cites *Tinder v. Nordstrom, Inc.*, 84 Wn. App. 787, 929 P.2d 1209 (1997) in support of its argument against the application of res ipsa loquitor, a case wherein the department store was dismissed because an escalator abruptly stopped.[1] That case has absolutely no bearing on the present case because in *Tinder*, there was no evidence (even after the noted injury) of any malfunction in the escalator (here, a bungee cord admittedly broke); the elevator could be stopped by a separate button and therefore, the injury could have occurred absent negligence (Rayna's vehicle would not have lost control on a sunny summer day on oil unless it had been negligently spilled); and there was a question of contributory negligence because the Plaintiff was not holding the handrail (where Plaintiff here was determined to not be comparatively at fault). In so much, the holding indicates that a "common carrier," such as an escalator, is not necessarily an insurer of its' passenger's safety, that is not an issue in this case as Rayna Mattson was a user of the road to whom Defendants

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1 *Tinder, supra*, also came before the applicable Supreme Court case of *Curtis v. Lein*, 169 Wn.2d 884, 239 P.3d 1078 (2010), cited in Appellant's opening brief and the result may have been different under the Court's holding in *Curtis*.

clearly had a duty, not a passenger in Defendants' truck. Finally, the *Tinder* Court concluded that Defendant Nordstrom had actually warned the Plaintiff because it had posted warnings signs specifically advising that the escalator could stop suddenly and to hold the handrail. In this case, Defendants had posted no warnings on their truck that the hoses they were carrying could come loose and rupture and spill used oil on the road.

As repeatedly argued at trial by Defendants, Respondents here argue that the length of the spill noted by witnesses who took no measurements and were more focused on Rayna's injuries, or the that eyewitness John Watchie who inexpertly described the smell as being of a strong nature (and who qualified that as it was) is evidence the oil on the road could not have been from their truck. Thus, Respondents continue to argue that the oil – despite the fact that they admitted they had a ruptured hose that spilled oil onto the roadway – was not from their truck and reiterate the same improper and never previously pled empty chair defense.

CR 8(c) notes that a party in an answer shall set forth "any matter constituting an avoidance or affirmative defense." Defendants were required to plead the affirmative defense of empty chair, or else it is deemed waived. See, *Lybbert v. Grant County, State of Wash.*, 141 Wn.2d 29, 1 P.3d 1124 (2000) Here, Defendants never pled the affirmative defense of empty chair, but were effectively allowed to argue that it could not have been them that dropped the oil, so it must have been someone else. Not only was this argument improper given their failure to

plead the defense, the argument muddled up negligence and causation.

A defendant who desires to establish at trial that the plaintiff's damages were caused partially or wholly by a nonparty must plead the nonparty's fault as an affirmative defense:

> Whenever a defendant or a third party defendant intends to claim for purposes of RCW 4.22.070(1) that a nonparty is at fault, such claim is an affirmative defense which shall be affirmatively pleaded by the party making the claim. CR 12(i).

The purpose of CR 12(i) is to apprise other parties, in the defendant's answer, of an unnamed person allegedly at fault, so as to facilitate orderly discovery and to allow other parties the opportunity to bring the nonparty into the suit in a timely fashion. Neither the parties,' pleadings or discovery in this case disclosed any evidence which would support an inference that there were any third parties or an "empty chair" at fault for the motor vehicle collision. The Court nevertheless, over considerable objections and motions, allowed the defense to continually make the argument, and then erroneously refused to instruct them in order to correct such error.

B. WASHINGTON DOES NOT RECOGNIZE AN EXCEPTION TO DEFENDANTS' DUTIES IN THIS CASE, NOR DID ANY EVIDENCE PRESENTED AT TRIAL SUPPORT INSTRUCTING THE JURY THAT DEFENDANTS' VIOLATIONS OF ANY STATUTORY AUTHORITY COULD BE EXCUSED.

The respondent argues at page 23 of its brief that "Washington recognizes that if circumstances beyond the control of the motor carrier may be without fault, even if there is a statutory violation." Respondent fails to cite any law whatsoever to support this statement. Further, in this

case, there were no circumstances set forth by the Defendants at trial that "were beyond their control." Defendants repeatedly admitted they knew the stretch of I-5 was "very rough" on an empty truck like theirs, knew it could dislodge equipment, including, but not limited to hoses, and knew that the hose that ruptured contained residual oil. Their expert never once testified that Defendants' set up of their equipment was reasonable, particularly given the known rough road conditions and even admitted that such road conditions could be rough on an empty truck such that it was foreseeable that the bungee cord holding the hose could break and the hose could come loose. Conversely, Plaintiff's expert Chris Ferrone specifically testified that using bungee cords to secure a hose to the back of a truck was not a reasonable method.

As this Court is well aware, bracketed material in the pattern instructions is to be used "as applicable." Regarding the use of the bracketed material in its Instruction No. 22, the Comment to WPI 60.03 references the Comment to WPI 60.01.01. The Comment to WPI 60.01.01 explains that this bracketed paragraph should only be used when the party asserting a defense of justification or excuse shows the existence of an **emergency situation** and the exercise of reasonable care in disregarding the statutory requirements:

> It is the opinion of the committee that a plea of justification or excuse is a plea of avoidance under CR 8(c), and should therefore be pleaded as an affirmative defense, and that the party asserting such justification or excuse bears the burden of proving it. *See NeSmith v. Bowden,* 17 Wn. App. 602, 563 P.2d 1322 (1977) (the burden of presenting evidence of an emergency as justification for a statutory

violation is on the person asserting it, who must show the existence of an emergency situation and the exercise of reasonable care in disregarding the statutory requirements).

In this case, Defendants, as noted above, did not plead avoidance under CR 8(c), nor did they present any evidence of a cause beyond their control that would have justified or excused them from allowing the hose on their truck to escape. Defendants also failed to present any evidence showing that they exercised ordinary care to guard against any cause that was beyond their control. Doing a 10-15 minute check of their entire truck, which does not in any way document that Defendants properly secured the hoses in anticipation of the known violent conditions of I-5 on an empty truck did not entitle them to utilize the bracketed portion of WPI 60.03. Given the absence of such evidence supporting the bracketed portion, the trial court incorrectly ruled that the bracketed paragraph relating to emergencies applied in this case.

The Respondents cite *Wood v. Chicago, M., St. P. & P.R. Co.,* 45 Wn.2d 601, 277 P.2d 345 (1954) *adhered to* 45 Wn.2d 601, 283 P.2d 688 (1955); *Bissell v. Seattle Vancouver Motor Freight, Ltd.,* 25 Wn.2d 68, 168 P.2d 390 (1946)(refusing to instruct that failure of defendant to have rear lights burning on his truck at the time of the accident was negligence per se where jury could conclude that tail lights stopped burning due to the collision, which could have caused them to become disconnected) in support that the bracketed portion of the instruction was appropriate. However, those cases referring to the allowance of a party to use an

excuse or justification for a violation of a statute, which were decided prior to the enactment of the 1986 tort reform, only explain that the defendants could not be charged with for negligence per se due to issues of either contributory fault or an emergency. *See Wood, supra,* at 609.

Rather, the case of *Jess v. McNamer*, 42 Wn.2d 466, 470, 255 P.2d 902 (1953) is more applicable and instructive wherein the Court explained when a party's violation of a statute can be excused:

> This rule is not applicable in the instant case because here the violation was not due to some cause beyond the violator's control, nor was it a violation against which reasonable prudence could not have guarded. The failure to place warning devices on the roadway was due to appellant's violation of statute and lack of prudence in failing to carry such devices in his truck. The fact that, after appellant negligently created the risk, he exerted every effort to overcome the hazard, does not operate to cleanse the original act of its negligent character. This is made clear in 2 Restatement of Trots, 1181, § 437, where it is said:
>
> > 'If the actor's negligent conduct is substantial factor in bringing about harm to another, the fact that after the risk has been created by his negligence the actor has exercised reasonable care to prevent it from taking effect in harm does not prevent him from being liable for the harm.'

Jess v. McNamer, 42 Wn. 2d 466, 470, 255 P.2d 902, 904 (1953)

It should also be noted that Respondents' argument, which suggests that because this issue never happened before with their fledgling company that started only months before the collision at issue, that should somehow excuse their negligence and thereby support the jury's verdict. That proposition is illogical and would render nearly all accidents where the negligent party had never before been in the situation giving rise to

injury. Further, such argument is contrary to basic laws regarding a driver's duty to secure his or her load, equipment, etc. *Skeie v. Mercer Trucking Co., Inc.*, 115 Wn. App. 144, 61 P.3d 1207 (2003) ("considering the statutory duty to secure a load, so that it does not fall and create a hazard to other users of the road, RCW 46.61.655, we conclude that Mercer owed a legally enforceable, societally recognized obligation to secure a load so that it would not detach during a collision.") *See also*, *Solomonson v. Melling*, 34 Wn. App. 687, 690, 664 P.2d 1271 (1983)(holding that the failure of a logging truck and trailer to be equipped with a safety chain or other positive alternative means of keeping the trailer from parting with the logging truck towing it, thus resulting in the connecting pin coming out, constituted negligence as a matter of law)

Here, the hose falling off the truck, rupturing, and spilling used oil still left in it given the known violent conditions of the road was entirely foreseeable and all of the evidence demonstrated that. There was no excuse and no emergency situation to excuse any violation of any of the applicable statutory authorities should the jury have concluded the defendants were in such violation. Finally, as Plaintiff's expert, Chris Ferrone, explained, even if a wheel comes off a truck, the motor carrier is liable for that situation regardless of the reasons. (RP 03/28/12, p. 507)

C. JUROR NO. 10 BROUGHT EXTRINSIC EVIDENCE INTO DELIBERATIONS, WHICH HE UNDISPUTEDLY FAILED TO DISCLOSE DESPITE NUMEROUS OPPORTUNITIES AND WHICH WOULD HAVE BEEN THE BASIS FOR A MOTION TO EXCUSE HIM FOR CAUSE

At trial, as reiterated in their Response brief, the defense argued that the State Trooper's investigation was extremely poor and because of that, the parties did not have critical information such as the measurement of the oil on the road, etc. that would help determine that they were responsible for the oil on the road that caused Rayna's vehicle to lose control. This argument then fueled the Defendants empty chair – someone dropped the oil from the sky – defense. Juror Number 10's uncontroverted recitation of his experience at OSHA and the standards of investigation he employed in deliberations and of which he advised his fellow jurors' was thus rendered a direct issue in the case. Further, Juror Number 10 clearly failed to speak up when he had at least three opportunities to do so in relaying his LAW ENFORCEMENT and/or INVESTIGATION experience; twice in voir dire and once in answering a very specific juror questionnaire.

Trying to limit the meaning of law enforcement to only mean the "police" is nonsensical; the broader terminology was intentionally used in order to **not** limit the question. Respondents also argue that Plaintiff did not specifically ask Juror No. 10 if he worked for OSHA. That argument is beyond specious. The parties were given less than an hour each (and defense counsel did not use most of that time) to question 40 jurors; the

purpose of the Juror Questionnaire was to streamline and voir dire and make the most efficient use of the voir dire time as possible. Juror No. 10 clearly indicated he conducted investigations in his employment with OSHA and was using his expertise in that regard. The very purpose of OSHA is stated to be "the federal agency charged with the enforcement of safety and health legislation"; it involves law enforcement by its very main function and Juror No. 10 clearly thought that as well during deliberations as evidenced by Mr. Besteman's declaration.

Respondents cite *State v. Balisok*, 123 Wn.2d 144, 866 P.2d 631 (1994) in support of their argument that there was no juror misconduct here. *Balisok* is not instructive as that case dealt with a jury's reenactment of an alleged struggle between defendant and victim that had already once been reenacted during trial testimony. The Supreme Court reiterated that the evidence was therefore not "extrinsic" because the jury did not consider any evidence outside the trial, but rather evidence already presented at trial.

Rather the case of *State v. Briggs*, 55 Wn. App. 44, 776 P.2d 1347 (1989) cited by both parties, is directly on point for this case. In *Briggs*, the Court held that where the defense was based upon the victim's failure to identify himself as a stutterer, a juror's failure to disclose his speech disorder during voir dire (even though the juror did not view it as a stutter) and his subsequent discussion during deliberation of a stutteror's ability to perform certain acts while stuttering, constituted misconduct requiring a new trial. The Court stated at pages 55-56:

Had juror White responded truthfully to the relevant voir dire question in this case, appellant could have pursued the matter to determine whether the juror should be excused for cause. Certainly he would have been asked, as were the other jurors who revealed in voir dire their prior experiences with speech disorders, if he would be able to refrain from doing precisely what he did in this case-discussing his unique personal experience in deliberations. If he had answered no, he would not set aside his personal experience with a speech disorder, but would use it to reinforce the expert testimony and to rebut the defense witnesses who claimed appellant always stuttered, he undoubtedly would have been excused for cause.

What juror White did in this case by introducing the withheld information into deliberations was precisely what voir dire is intended to avoid, by either exposing an inability to set aside personal considerations or by getting the juror to commit, under oath, not to do so. Accordingly, appellant was prejudicially denied the protection voir dire offers to preserve jury impartiality, which is " 'a jury capable and willing to decide the case solely on the evidence before it.' " *McDonough,* 464 U.S. at 554, 104 S.Ct. at 849 (quoting *Smith v. Phillips,* 455 U.S. 209, 217, 102 S.Ct. 940, 946, 71 L.Ed.2d 78 (1982)).

Moreover, appellant was also prejudiced by juror White's use of the undisclosed information during jury deliberations. Juror misconduct involving the use of extraneous evidence during deliberations will entitle a defendant to a new trial if there are reasonable grounds to believe the defendant has been prejudiced. *State v. Lemieux,* 75 Wash.2d 89, 91, 448 P.2d 943 (1968). **Any doubt that the misconduct affected the verdict must be resolved against the verdict**. *Halverson v. Anderson,* 82 Wash.2d 746, 752, 513 P.2d 827 (1973). **This is an objective inquiry into whether the extraneous evidence could have affected the jury's determinations and not a subjective inquiry into the actual effect of the evidence on the jury because the actual effect of the evidence inheres in the verdict**. *Gardner v. Malone,* 60 Wash.2d 836, 841, 376 P.2d 651, 379 P.2d 918 (1962). This inquiry necessarily involves consideration of the purpose for which the extraneous evidence was interjected into the jury's deliberations. "[A] new trial must be granted unless 'it can be concluded beyond a

> reasonable doubt that extrinsic evidence did not contribute to the verdict.' " *United States v. Bagley,* 641 F.2d 1235, 1242 (9th Cir.1981) (quoting *Gibson v. Clanon,* 633 F.2d 851, 855 (9th Cir.1980); *see also United States v. Bagnariol,* 665 F.2d 877, 887 n. 6 (9th Cir.1981); *Llewellyn v. Stynchcombe,* 609 F.2d 194, 195 (5th Cir.1980) ("a defendant is entitled to a new trial unless there is no reasonable possibility that the jury's verdict was influenced by the material that improperly came before it.")
>
> *State v. Briggs*, 55 Wn. App. 44, 54-56, 776 P.2d 1347, 1353-54 (1989) (Emphasis added)

Further, the information that Juror No. 10 provided was not an issue of "personal life experiences." As noted by the Court in *Briggs, supra*, at p. 58 "[w]hile a jury, in exercising its collective wisdom, is expected to bring its opinions, insights, common sense, and every day life experiences into deliberations, the information related by [Juror No. 10] was of a different character" and "was highly specialized." (Citation omitted) *Compare to Chiappetta v. Bahr*, 111 Wn. App. 536, 46 P.3d 797 (2002), a case cited by the Respondents, which did not deal with a failure to disclose and where the Court found that personal experience with injuries is within the realm of life experiences that a juror is expected to bring into deliberations. Compare to *Richards v. Overlake Hospital Medical Center*, 59 Wn. App. 266, 796 P.2d 737 (1990), also cited by Respondents and holding that the trial court did not abuse its discretion in not finding juror misconduct when juror opined based upon her medical background, that the mother's flu, which was noted in the medical records in evidence, was the cause of the child's birth defects (which were at issue in this medical malpractice case). The Court there specifically noted that the juror whose misconduct was at issue had disclosed her medical

background, which also included work with retarded children in voir dire and stated that "this fact distinguishes the Briggs case ..." *Id.* at 274.

The case of *McCoy v. Kent Nursery, Inc.*, 163 Wn. App. 744, 260 P.3d 967 (2011) also does not help Respondent. There, the Court's first lines in the opening of its analysis clarify the significant difference in the background facts from those in this case:

> This case presents a cautionary tale of the risks parties and counsel take when waiving a court reporter's services during voir dire in civil cases. The McCoy's counsel supported the motion for a new trial based on juror misconduct with a declaration reciting her recalled – but disputed – exchanges with jurors 2 and 11 during postverdict conversations, claiming that these two jurors failed to disclose information during voir dire that she later learned during the postverdict discussion.

McCoy, 163 Wn. App. at 760.

The Court further noted:

> Although the McCoys assert that jurors 2 and 11 withheld information during voir dire, the McCoys' counsel's declaration did not indicate that the voir dire questions she directed to these jurors would have elicited the claimed omitted answers, information or additional information that would have led to a challenge for cause. . . . Declarations by other counsel and jurors counter the McCoys counsel's assertions and indicate that juror 2 and juror 11 generally disclosed their respective backgrounds . . . Moreover, the other jurors' declarations, submitted by the Nurseries with their motion for reconsideration, stated that jurors 2 and 11 disclosed their relevant knowledge during voir dire and the other jurors repeatedly stated that the jury based its verdict solely on the evidence presented at the jury trial.
>
> Here, the record is silent about the actual questions asked of jurors during voir dire or even specific allegations of the allegedly unanswered voir dire questions ... Further, the McCoys' counsel does not allege in her declaration that jurors 2

> and 11 interjected extrinsic information during deliberations . . . on this record, the McCoys do not show that, during voir dire, juror 2 or juror 11 failed to disclose potentially material facts that indicated bias or any of the other allegedly omitted information. Accordingly, we hold that the trial court abused its discretion when it granted a new trial based on jury misconduct.

Id. at 763-764.

In the present case, voir dire was reported; questionnaires were given to each potential juror and then filed; and the only declaration filed in support of Juror Misconduct was uncontroverted. Further, in *McCoy*, the jurors who were accused of misconduct did actually disclose their backgrounds whereas in the present case, Mr. Reyes – Juror No. 10 – only indicated he worked at Costco, which was extremely misleading and despite many opportunities to otherwise disclose his employment with OSHA and he failed to do so. Had Juror No. 10 disclosed his background in investigation and/or enforcement work through OSHA, Plaintiff would have then had the opportunity to question him then make a challenge for cause, which she would have given his obvious views on investigation standards and his insertion of his own opinion regarding legal standards.

With regard to the Respondent's citation to *McCoy* for the proposition that Matthew Besteman's statements in his declaration inhere in the verdict and therefore cannot be considered, the Court reiterated the law cited in Appellant's Opening brief that "the Court may rely on affidavits to establish a juror's acts constituting misconduct without probing their mental processes or other matters inhering in the verdict." Id. at 765-766. Juror No. 10's recitation of his past experience and his use of

his own investigation and legal standards are facts that are not "linked to the juror's motive, intent, or belief," or describe their effect on the jurors.

III. CONCLUSION

Appellant requests the relief set forth in her Opening Brief.

RESPECTFULLY SUBMITTED this 28th day of June, 2013.

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No.: 43735-0

Pierce County Superior Court No.
06-2-09015-8

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the following is true and correct.

On June 28, 2013, pursuant to RAP 18.6(c), I filed an original and a true and correct copy of:

Appellant's Reply Brief

by sending them via U.S. Mail to the:

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and served a copy of each document on the following via U.S. Mail to:

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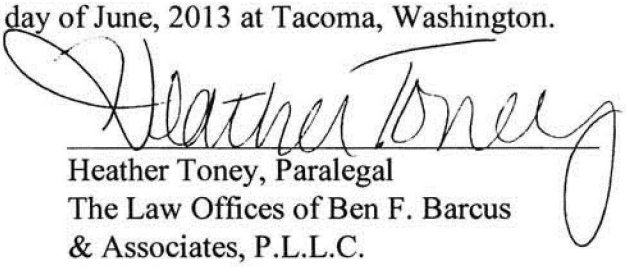

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